No: 95-65

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1995

JAMES L. HOOPER, M.D., et al.,
Petitioners,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Precisely because this Court's exercise of certiorari jurisdiction is not "merely to give the defeated party in the Circuit Court of Appeals another hearing" (Br. in Op. at 4), we limited the issues to those having special, important, and broad ranging impact, and with respect to which there is conflict in the circuits.[1] Both the Rule 11 sanctions and the Age Discrimination rulings present such questions. While obviously the issues are of importance to Petitioners, their implications extend will beyond this particular case.

I.

The absence of any supporting evidence for the "abiding conviction" on which the Rule 11 Sanctions were based, and which the Fourth Circuit affirmed, raises important Fifth Amendment Due Process questions, and conflicts with decisions of other circuits.

"[I]t is a violation of due process to convict and punish a man without evidence of his guilt." *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960) (footnote omitted).[2] *To like effect*, *Garner* v. *Louisiana*, 368 U.S. 157, 163 (1961). Thus, there must be some factual basis for imposing sanctions. The Fourth Circuit's affirmance of the district court's orders of Rule 11 sanctions violates Fifth Amendment Due Process requirements. Sanctions were based substantially on an "abiding conviction" of the district judge, unsupported by *any* evidence, that the case was pursued with intent to cost defendants as much as possible to defend.

In our briefs in the court of appeals, at oral argument, and in our Petition for Rehearing, which was denied by a 2 to vote,[3] we asked Respondents to state what evidence

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[1] Contrary to Respondents' implication (Br. in Op. at 7 n.2), we do not concede the correctness of the rulings as to which we have sought certiorari. Their omission is recognition that simply because a ruling is wrong does not make it worthy of review by this Court.

[2] *Thompson* involved fines of $10.00 each, one for loitering, the other for disorderly conduct.

[3] The Petition for Rehearing was directed to the sanctions and

supported the "abiding conviction" of the district judge, for which he had cited nothing. Neither the Fourth Circuit nor Respondents were able to cite any evidence. And, significantly, Respondents are unable to cite even a gossamer, let alone a scintilla, of evidence in this Court to support the "abiding conviction" of the district judge.

While Petitioner Sachsel has not been convicted of a crime,[4] he has suffered both a denial of property and damage to his professional standing and reputation.[5] Both are property rights cognizable and protected by the Fifth Amendment. The implications and consequences flowing from the Fourth Circuit's affirmance of the district court's rulings thus transcend this case. *See also*, Pet. at 25-27. Rule 11 was not intended to operate without regard to Due Process requirements. *See also*, Pet. at 12-14.

The $5,000 sanction was imposed based on the unsupported "abiding conviction" of the district court that this action was prosecuted with the intent of "causing the [Respondents] as much expense and inconvenience as possible in defending this action" (A.64), and that "it is [the district court's] abiding conviction that this case was pursued by [Dr. Hooper], with the knowing assistance of his counsel, with a purpose of costing the [Respondents] as much as possible to defend against it" (A.63).[6]

Age Discrimination issues.

[4] In *Thompson*, the Court observed "that although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari to review the police court's judgments" (362 U.S. at 203).

[5] Sachsel has been admitted to practice since 1963 and never has, prior to this, even been the subject of any disciplinary proceeding. He spent 14 years with U.S. Government agencies, including the Civil Division Appellate Staff of the U.S. Department of Justice. He has prepared and argued cases in nearly every U.S. court of appeals, other Federal and State courts, and the Supreme Court of Virginia. *See also*, A.145 n.1.

[6] The district court also stated that the Age Discrimination claim was "based on the flimsiest of justifications" and was "brought for the

Identical speculation was the basis for the $500 sanction for filing a permissible and proper motion. *See*, Pet. at 27-28. In ordering a response to Respondents' request for sanctions, made as part of their opposition to a perfectly proper motion, the district court stated (A.56), "Plaintiff now wishes to be able to present his breach of fiduciary duty claim all over again in the state court, with a new judge and, presumably a new round of *expensive* proceedings" (emphasis added), and that it would not "allow [Dr. Hooper] to cost Defendants even more in legal fees by litigating the same claim in another court." These statements were made after the district court ordered a response to Respondents' motion seeking $176,000 in sanctions, and only two weeks prior to its order imposing $5,000 in sanctions based on its "abiding conviction" with respect to which it cited no evidentiary support.[7]

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purpose of getting the case into federal court in the first place" (A.63). It cited no evidence to support that statement. There is none.

[7] Respondents did not seek sanctions based on a claim that Dr. Hooper and his counsel needlessly increased the cost of litigation. They did state, inaccurately, that there were a large number of discovery filings *prior* (*see*, Pet. at 25-26) to the filing of the Second Amended Complaint. *See*, A.157. Thus, Petitioners did not have an opportunity to respond to the district court's "abiding conviction" prior to the ruling. We did respond in a later filed Statement of Position. *See*, A.193 n.4. Petitioners also responded to such suggestions previously made by the district court. *See*, A.181-184. The issue was repeatedly addressed by Petitioners in the court of appeals. Petitioners stated in their Main Brief in the court of appeals that "[n]o basis for [the district court's] abiding conviction is given", and that "[t]here is none." In their Reply Brief, Petitioners said:

> The district court cited nothing to support [either its "abiding conviction" or its statement that the "age claim was brought for the purpose of getting into Federal court in the first place"]. Defendants have cited nothing in the record to support the aforementioned statements of the district court. They have cited nothing because there is nothing. There is nothing because the statements are not true. [footnote omitted].

In addition to the Constitutional considerations, Rule 11 sanctions cannot stand if based on a "clearly erroneous assessment of evidence." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1989). A conclusion based on *no* evidence and on speculation is even more "clearly erroneous." *See*, Pet. at 25. Moreover, not to require counsel be informed what he allegedly did wrong defeats an important purpose of Rule 11 -- to deter future violative conduct -- and conflicts with decisions in *FDIC* v. *Calhoun*, 34 F.3d 1291, 1297 (5th Cir. 1994) ("require a *detailed* finding that the proceedings were both 'unreasonable' and 'vexatious'" (emphasis added)); *Coltrade Intern., Inc.* v. *U.S.*, 973 F.2d 128, 131 (2d Cir. 1992) ("Broad findings of frivolous litigation, dilatory tactics, or bad faith are insufficient to support sanctions"); *Thomas* v. *Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989) ("order imposing sanctions should state the *specific* basis . . . to allow for meaningful appellate review" (emphasis in original)); and *Brailey* v. *Campbell*, 832 F.2d 1504, 1513 (10th Cir. 1989) ("If a trial court imposes sanctions, specific findings are required"). *See also*, Pet. at 25-27. As stated in our Petition for Rehearing in the court of appeals:

The Petition for rehearing in the court of appeals, which was denied by a 2 to 1 vote (A.80-81), states, *inter alia:*

> The $5,000 sanction was based in substantial part on the district court's statement that appellant, with the knowing assistance of his counsel, sought to cost defendants as much as possible in the litigation below. This statement is not only unsupported by the Record. It is contrary to the Record . . .
>
> * * *
>
> Furthermore, the premise of the [$500] sanctions was the district court's clearly erroneous conclusion . . . that counsel was continuing a pattern of seeking illegitimately to cost defendants money.

> Counsel feels himself in a Kafkaesque twilight zone. He stands accused of having committed transgressions of conducting this case in a manner designed to cost defendants unreasonable sums, and no one will tell him what he allegedly did to accomplish this end.

Respondents inaccurately state that "Sachsel criticizes the abuse of discretion standard this Court set in *Cooter & Gell* v. *Hartmarx Corp.*" (Br. in Op. at 12-13). The Petition does not challenge or criticize *Cooter & Gell*. What we said is that the court of appeals misinterpreted or misapplied that standard. *Cooter & Gell* clearly states that when Rule 11 sanctions are imposed based on an erroneous view of the law or a clearly erroneous assessment of the evidence, the district court abuses its discretion. *See*, Pet. at 11, 25, and A. 155-157.[8]

Respondents' position would indeed make the practice of law all but impossible, and, consequently, limit access to the courts. Only iron clad cases could safely be pursued, and only absolutely defensible cases could be defended.[9] For fear of arbitrary and substantially unreviewable sanctions, the law

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[8] Respondents' statement (Br. in Op. at 15 n.8) that Dr. Hooper's offers of settlement are inadmissible under FRE Rule 408 as to the sanctions issue is flatly wrong. Settlement and compromise offers are inadmissible only as to the issue of liability. *See, e.g., Brauer Elec. Mfg. Co.* v. *Tornado Systems of America*, 687 F.2d 182, 185 (7th Cir. 1982); *Pierce* v. *F.R. Tripler & Co., Inc.*, 770 F.Supp. 118, 123 (S.D.N.Y. 1991); *Iberian Tankers Co.* v. *States Const. Corp.*, 388 F.Supp. 1190, 1192 (S.D.N.Y. 1975).

Respondents also inaccurately state (Br. in Op. at 14) that we argued "the Fourth Circuit lacked a sufficient record with which to evaluate the District Court's imposition of sanctions." What we said is that the court of appeals stated it examined the reasons given by the district court, and that it did not state it considered the record, or that the record contains support for the trial court's conclusions as to counsel's motivations and conduct (Pet at 26-27).

[9] Anyone who has practiced law or observed the legal process knows that even cases that appear certain can go wrong.

could become static. The charitable hospital immunity doctrine might still stand, and segregation of schools might yet be. Any innovative legal theory would be pursued at counsel's peril for fear a trial judge might find an argument frivolous, a finding that would be required to be affirmed by a reviewing court so long as it did not reverse the lower court on the merits.[10] *See*, *Operating Engineers Pension Trust* v. *A - C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988).

The Rule 11 issues impact the entire Federal Judicial System, the practice of law generally, and lay citizens' access to the courts.

II.

The Fourth Circuit's Age Discrimination ruling conflicts with this Court's decision in *Price Waterhouse* and with decisions in other circuits.

A. The Conflicts

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989), makes plain that remarks at work may be evidence of discrimination (remarks that are not "'stray'" remarks can be evidence (450 U.S. at 251 (plurality opinion), and *Id.* at 291, Mr. Justice Kennedy dissenting, indicating that even "'stray remarks'" may prove evidence of discriminatory animus). The Fourth Circuit affirmed a decision that held a remark evidencing age animus, coupled with intent to end Petitioner Hooper's employment[11], followed immediately by harassment, was an isolated comment that was too prejudicial to serve as evidence of discrimination. It did not address two other remarks evidencing age animus, and disparate treatment. This affirmance by the Fourth Circuit is inconsistent with *Price Waterhouse*.

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[10] States have adopted equivalents of Rule 11 and often look to Federal decisions for guidance in interpretation and implementation of those provisions.

[11] Respondents admit "efforts to separate from Dr. Hooper" (Br. in Op. at 2).

The Fourth Circuit's decision also conflicts with the decisions of at least four other circuits. *See, e.g., Normand* v. *Research Institute of America, Inc.*, 927 F.2d 857, 864 (5th Cir. 1991) (statements referring to age, some over a decade before Normond's constructive discharge, supported jury verdict for plaintiff and required reversal of judgment n.o.v., noting at n.3 that cases in which remarks were insufficient to establish age animus *"either* were made by someone who did not participate in the decision to terminate . . ., *or* they were isolated *and* plaintiff's only evidence" (emphases added)); *Alphin* v. *Sears Roebuck & Co.*, 940 F.2d 1497, 1500-1501 (11th Cir. 1991) (remark that "'both of us have been around too long and were too old and making too much money'" circumstantial evidence of age animus precluding summary judgment for defendant); *La Pointe* v. *UAW*, 8 F.3d 376, 379-380 (6th Cir. 1993) (statements of intent to "get older employees out" direct evidence establishing *prima facie* Age Discrimination case and precluding summary judgment); *Burns* v. *Gadsden State College* 908 F.2d 1512, 1518-1519 (11th Cir. 1990) (statements precluded summary judgment and employer can prevail at summary judgment stage *only* if evidence it would have acted the same without proscribed motive "is so strong a reasonable person could" reach only that conclusion).

E*ven the case relied on by the Fourth Circuit (A. 8) does not support its decision. See, Gagne* v. *Northwestern Mut. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (solitary remark at company meeting of need for "'younger blood'" not directed at any individual insufficient).

What constitutes sufficient evidence to withstand a motion for summary judgment in Employment Discrimination cases transcends this particular case. As stated in the Petition at 17, when remarks are admissible evidence of discrimination, and when they are direct evidence, both are critical issues. This decision of the Fourth Circuit, which is inconsistent with the law in other circuits, also emphasizes lower court confusion in such cases. See, Pet. at 17 n.27. That problem is

magnified when, as here, reliance on such evidence forms a basis for Rule 11 sanctions. Moreover, leaving these issues unclarified encourages litigation when it should not be pursued and discourages bringing meritorious claims.[12]

B. Respondents' Other Erroneous Contentions

Respondents state (Br. in Op. at 2) that they did not harass Dr. Hooper. In his affidavit (which was required to be credited) in support of the summary judgment opposition Dr. Hooper detailed harassment by Respondents that began immediately after they "voted [his] old ass out as President" and had "younger blood" running the corporation. He stated (A.139 para. 18) that he "was addressed in a hostile and condescending manner at partner's meetings, was asked to vacate the office [he] occupied for years, was directed to work in a satellite office 20 miles away, was denied keys to the office [he] founded, received sarcastic memoranda, and was denied access to financial information" and that his partners "held what were[,] in effect, secret board meetings from which [he] was excluded." Respondents did not deny any of the above quoted statements. Furthermore, such denials would have been irrelevant for summary judgment purposes.[13]

Respondents make two other legally incorrect statements. They state (Br. in Op. at 9) that Dr. Hooper "failed to present *any* evidence he was replaced by a younger

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[12] Contrary to respondents' contention (Br. in Op. at 9-11), this Court has addressed proof issues in the past because of their broad impact. *See, e.g., Price Waterhouse* v. *Hopkins, supra*; *St. Mary's Honor Center* v. *Hicks*, __ U.S.__, 113 S. Ct. 2742 (1993); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 278 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[13] Respondents challenge, in conclusory fashion, a number of other statements in the Petition (Br. in Op. at 2). Except for their statements regarding MMG being a professional corporation, they simply are stating their version of disputed facts and/or legal conclusions. We are puzzled by their statements suggesting we represented MMG to be a partnership rather than a professional corporation since we clearly state in the Petition and in the text at 2 and n.3 that MMG was a professional corporation.

person - a required element of his action" (emphasis in original), and that once they articulated nondiscriminatory reasons for their action, the only way Dr. Hooper could survive summary judgment was to show those reasons pretextual. Both statements are flatly wrong.

In essence, respondents argue that the only way to establish employment discrimination is to satisfy the precise formula of *McDonnell Douglas, supra*. That is incorrect. As stated in *Lewis* v. *AT&T Technologies, Inc.*, 691 F.Supp. 915, 919 (D. Md. 1988), "It is possible to establish a *prima facie* case without satisfying all the *McDonnell Douglas* criteria", since "*McDonnell Douglas* standards [are] not inflexible because the facts necessarily vary in [discrimination] cases." Showing that a proscribed factor motivated an employment decision establishes a case.

To support their contention that once they articulated a nondiscriminatory reason Dr. Hooper could survive summary judgment only by showing pretext, Respondents cite *Parker* v. *Federal Nat. Mtg. Ass'n*, 741 F.2d 975 (7th Cir. 1984). However, *Parker* itself shows Respondents' argument wrong, stating that a plaintiff in an Age Discrimination case "can survive a motion for summary judgment simply by producing circumstantial evidence from which a trier of fact can reasonably infer that age was a determining factor in the employment decision", and that "[o]nce the plaintiff presents the Court with some evidence his employer harbored the discriminatory motive, summary judgment for the defendant is inappropriate because there is a disputed fact material to the case" (*Id.* at 780). *Parker* makes clear that showing pretext is not the sole way to survive summary judgment. Our Petition references such evidence, and shows, that, at a minimum, disputed issues of material fact. Furthermore, there is evidence of pretext since Respondents' reasons are incredible on their face. *See*, Pet. at 8-10, 19-20.

Finally, we note that the district court granted summary judgment improperly by resolving conflicts in the evidence and drawing inferences from the evidence that were

favorable to the moving party when it was required to do the opposite. As the Petition states, Dr. Hooper's evidence consisted of more than one comment. There were three statements from which age animus could be inferred, and there was disparate treatment.[14]

In sum, this issue, like the sanctions, presents both important questions, and conflicting courts of appeals decisions. Resolution by this Court is required.

III.
Conclusion

For the foregoing reasons, and the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

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[14] Respondents' statement that Dr. Hooper based his claim of disparate treatment on "unproven allegations of medical misconduct" (Br. in Op. at 7 n.3) is inaccurate. The conduct of a younger physician which was excused was serious sexual misconduct with a patient, was admitted to Dr. Hooper, was never denied in this litigation by Respondents, and is relevant because it occurred in the same time frame as allegedly improper conduct by Dr. Hooper -- alleged and unproven conduct on which Respondents relied as a reason for terminating Dr. Hooper. *See*, Pet. at 4, 19.